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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FORSTER-GILL, INC., Plaintiff and Appellant, v. COUNTY OF HUMBOLDT, Defendant and Respondent.	A139916 (Humboldt County Super. Ct. No. CV120323)

Forster-Gill, Inc. is the owner of 66 acres it wishes to develop as multifamily affordable housing. On May 11, 2012, Forster-Gill filed a petition for issuance of a writ of mandate against the County of Humboldt concerning legislative actions taken by the County's Board of Supervisors, which it contended thwarted those wishes. Forster-Gill alleged in its petition as follows:

"On August 24, 2010, the County adopted [an] . . . update" to the housing element of its General Plan, "with a commitment to rezone 113.5 acres to multifamily by January 1, 2011 per . . . Table Z-3 . . . . By adoption of the August 24, 2010 Housing Element, the County identified [Forster-Gill's] Property (among a list of 14 properties), as land suitable for development for affordable, residential multi-family uses."

"By letter of September 1, 2010, the State Department of Housing and Community Development (HCD) certified the August 24, 2010 Housing Element as compliant with State law, conditioned on rezoning the 113.5 acres . . . . On February 7, 2011, HCD de-certified the August 24, 2010 Housing Element, citing the County's failure to rezone

those properties to multifamily, as provided in the August 24, 2010 adopted Housing Element . . . ."

"The County took no action to rezone said properties . . . and, in fact, abandoned the effort for all but one property . . . ." "Following receipt of the February 7, 2011 HCD letter, a Judgment was entered by stipulation of the County . . . providing that the County's August 24, 2010 Housing Element fails to comply with Article 10.6 of the Government Code[1] due to failure to rezone the parcels . . . . The Judgment further provides that the County 'will complete the multi-family rezoning necessary' under the August 24, 2010 Housing Element . . . and obtain 'certification, conditional or otherwise' by HCD that the County is in compliance with the August 24, 2010 Housing Element."

"Instead of rezoning the properties, . . . the County pressed ahead with a collection of new properties, resulting in a rezoning of 14 properties on August 30, 2011. The County submitted this effort to HCD, which declined to certify it. The County thereafter 'withdrew' its request for HCD certification in the Fall of 2011."

"On January 30, 2012, the County submitted a draft Housing Element update to HCD . . . . The 2012 Draft Housing Element Amendment proposed to replace Table Z-3 with the properties rezoned by the August 30, 2011 action as part of the Affordable Multifamily Housing Inventory."

"State law requires the submittal of a draft Housing Element or amendment for a 45-day review period prior to its adoption, pursuant to Government Code § 65754.[2]. . . . On March 13, 2012, the County adopted the 2012 Housing Element Amendment without

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[1] Statutory references are to the Government Code unless otherwise indicated. Article 10.6, entitled "Housing Elements," and comprising sections 65580-65589.8, governs the contents and the procedures for adopting and implementing the housing element of the General Plan required of every county.

[2] "[T]he planning agency of the . . . county shall submit a draft of its revised housing element or housing element amendment at least 45 days prior to its adoption to the Department of Housing and Community Development for its review . . . . [¶] The department shall review the draft element or amendment within 45 days of the draft. The legislative body [of the county] shall consider the department's findings prior to final adoption of the housing element or amendment . . . ." (§ 65754, subd. (a).)

having received comments from HCD, prior to the tolling of the required 45-day period under State law."

"On March 15, 2012, within the 45-day period required by State law, HCD provided a response to the County with a written rejection of the County's proffered 2012 Housing Element Amendment, noting numerous concerns with the parcels added to its new Affordable Multifamily Land Inventory by the August 30, 2011 rezoning, as described in the 2012 Housing Element Update."

Based on these allegations, Forster-Gill stated two causes of action for issuance of a writ of mandate, based on the County's alleged violations of sections 65754 and 65583 which specify the contents of a housing element. Specifically: (1) "The County's adoption of the Housing Element [Amendment] on March 13, 2012 violates State law in that the County failed to wait 45 days for input from HCD, as required by § 65754," and (2) "The County's proffered parcels listed as included in the Affordable Multifamily Land Inventory in its 2012 Housing Element Update do not meet the requirements for suitability and availability under the Housing Element or State law." In the prayer of its petition, Forster-Gill requested that "A writ of mandate issue finding the [March] 13, 2012 action void and directing the County to rescind its May 13, 2012 approval of the 2012 Housing Element Amendment."

On October 31, 2012, Forster-Gill filed a first amended petition. The material differences were: (1) adding the allegation that "On August 28, 2012, the County adopted Resolution 12-17, adopting amendments to the Humboldt County Housing Element and deleting three sites from the Affordable Multifamily Land Inventory"; (2) adding allegations that "Because the Projects [i.e., "the March 2012 and the August 2012 Housing Element Amendments"] violate the State Planning and Zoning Laws and discriminate against persons of low or moderate income by failure to implement the Housing Element, the County's approval of the Projects must be set aside and the County must be enjoined from undertaking any portion of the Projects"; (3) expanding the prayer to ask that the writ of mandate also direct the County to rescind the action of August 28, 2012; and; (4) expanding the prayer to include "Damages to Petitioner from the County's

discriminatory housing practices, as allowed by . . . § 12955" and "Attorney's fees under . . . § 65980."

On May 7, 2013, the parties stipulated to filing a second amended petition by Forster-Gill that is not significantly different from the first amended petition.[3]

Following a hearing, the trial court denied Forster-Gill's petition and gave judgment for the County, from which Forster-Gill filed a timely notice of appeal.

Forster-Gill filed its opening brief here on March 24, 2014. It identified five arguments, three of which are pertinent here.[4] Quoting the captions of its brief, Forster-Gill contends: (1) "The County failed to comply with the State mandated 45-day period for HCD review of any Housing Element Amendment"; (2) "The County failed to refer the Housing Element Amendments of March 13, 2012 and August 28, 2012 to its Planning Commission, in violation of State law," and; (3) "The County failed to make required findings under Government Code § 65863 before lowering density on sites identified in the 2010 Housing Element to be rezoned to accommodate California's affordable housing requirements." The "Conclusion" of the brief reads: "For the foregoing reasons, Appellant Forster-Gill, Inc. respectfully requests that this Court reverse Judge W. Bruce Watson's Judgment . . . , and order the trial court to issue a Peremptory Writ of Mandate declaring the Respondent's actions of March 13, 2012 and

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[3] The only change was the addition of allegations that "The County removed the Property from Table Z-3 for the purpose of preventing its proposed development as multifamily property, despite its being included in August 24, 2010 Housing Element for that purpose."

[4] In its opposition to the petition before the trial court, the County contended that Forster-Gill "lacks standing to proceed" because it did not have the "beneficial interest" required by Code of Civil Procedure section 1086. (Actually, the more precise term may be "interested party" (see § 65587, subd. (b) ["Any action brought by any interested party to review the conformity . . . of any housing element or portion thereof or revision thereto"]).) The County also submitted that Forster-Gill was complaining about irregularities and missteps which amounted to non-prejudicial "matters of procedure" that under section 65010 did not justify relief. The trial court accepted both of these arguments. Forster-Gill contests both of these points in its opening brief, but neither is germane to the issue of mootness, and neither is addressed here.

August 28, 2012 invalid and directing the Respondent to rescind said Housing Element Amendments, as they were adopted contrary to California law."

The County filed its respondent's brief on May 22. At the end of its brief, the County stated that it had adopted a new housing element on May 11, 2014, which made Forster-Gill's appeal moot, and advised that "authorities in support of this position are set forth in Respondent's separate motion for dismissal contemporaneously filed with this Brief."

On May 28, before Forster Gill filed its reply brief, the County filed a request that we take judicial notice of Resolution No. 14-38 passed by the Humboldt County Board of Supervisors on May 13, 2014, "adopting the 2014 Housing Element," and the referred-to motion to dismiss Forster-Gill's appeal.

Forster-Gill filed its reply brief on August 11, 2014. In it Forster-Gill advised that the County "failed to attach any of the Housing Element update to the request for judicial notice. As a convenience to the court, and pursuant to Rule 8.204(d) [of the California Rules of Court], excerpts are attached hereto as Exhibit 'A,' for which judicial notice is hereby requested pursuant to Evidence Code § 452 as an official act of the County." The County also requested judicial notice of HCD determining that the 2014 Housing element "is . . . in full compliance with State housing element law (GC, Article 10.6)." These unopposed requests are granted.

Forster-Gill concluded its reply brief just as it had in its opening brief: "For the foregoing reasons and those contained in Appellant's Opening Brief, Appellant respectfully requests that this Court reverse Judge W. Bruce Watson's Judgment . . . , and order the trial court to issue a Peremptory Writ of Mandate declaring the Respondent's actions of March 13, 2012 and August 28, 2012 invalid and directing the Respondent to rescind said Housing Element Amendments, as they were adopted contrary to California law."

The prayers of Forster-Gill's three petitions and the conclusions of its appellate briefs were quoted to demonstrate why its appeal is moot.

" ' "[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." ' . . . 'It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.' [Citations.]" (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.) Stated more succinctly: " 'A case is moot when the decision of the reviewing court "can have no practical impact or provide the parties effectual relief. [Citation.]" [Citation.] "When no effectual relief can be granted, an appeal is moot and will be dismissed." [Citations.]' " (*Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1485.)

A host of decisions support Witkin's statement that "Repeal or modification of a statute under attack, or subsequent legislation, may render moot the issues in a pending appeal." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 754, p. 820.) That this principle applies equally to legislative enactments at the county level is unquestioned. One of the earliest instances came in this court. (*Equi v. San Francisco* (1936) 13 Cal.App.2d 140, 141-142.)

There are a number of exceptions, but none applies here. This is not an instance where injunctive or declaratory relief was ever at issue. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind*, *supra*, 67 Cal.2d 536, 541; *Paul v. Milk Depots, Inc*. (1964) 62 Cal.2d 129, 133.) Given that amending the County's General Plan does not seem to be a common occurrence, Forster-Gill does not invoke the exception for issues that are " 'capable of repetition, yet evading review.' " (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122 and authorities cited.) Nor does Forster-Gill maintain that a material question was left unanswered by the trial court. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind*, *supra*, at p. 541; *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 176.) Thus, we are not

presented with an instance where " ' "the judgment, if left unresolved, will preclude the party against whom it is rendered as to a fact vital to his rights" ' " (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1079). Put otherwise, nothing in the judgment concerning the validity of the 2012 actions will preclude Forster-Gill from challenging the 2014 enactment.

Forster-Gill initially opposed the County's motion to dismiss on the ground that the new housing element had not been 'certified" by HCD. However, judging by Forster-Gill's lack of opposition to the latest request for judicial notice, this ground appears to have been abandoned. The only objection left to Forster-Gill is to insist that "public interest requires this appeal to be heard" and that "prior planning period housing elements remain important under State law" in that "the Housing Element for 2014-1019 is but a continuation of the Housing Element for 2009-2014." We are not persuaded.

It may readily be conceded that every change or revision of a county general plan has an organic connection to all prior versions of that document. But it is to be remembered that Forster-Gill initiated this litigation with clear objectives—the invalidation of the housing element amendment of March 13, 2012, and later the August 28, 2012 amendment. In order to convince the trial court to grant that relief, Forster-Gill submitted more than 700 pages of administrative record and exhibits, and the County responded with what must have been hundreds of pages of its own. Yet there is no comparable history behind the adoption of the 2014 housing element, so the "continuation" between the two versions cannot be demonstrated beyond the theoretical.[5]

The enactment of the 2014 housing element nullified Forster-Gill's litigation strategy. Forster-Gill complains that the 2012 decisions were invalid because the proposed amendments were not approved by HCD, but the latest judicial notice request by the County shows that the same charge cannot be leveled at the 2014 enactment. Forster-Gill also complains that the 2012 decisions were invalid because the proposed

[5] We need not, and do not, draw any conclusion about either the procedural or the substantive adequacy of the County's 2014 housing element.

amendments were not "referred" to the County Planning Commission, but Resolution No. 14-38 has recitals that the commission "held public hearings and accepted comments" and then "recommended the Board of Supervisors adopt the 2014 Housing Element." Forster-Gill's final contention, that the County "failed to make findings" required by section 65863, would logically be confined to the 2012 enactments.

No one is interested in, or will benefit from, a determination of the procedural regularity of two votes by the Board of Supervisors in 2012 concerning something that is now superseded. Setting aside those two votes will bring no benefit to Forster-Gill, which does not argue otherwise in its opposition to the County's motion to dismiss. Thus, what our Supreme Court said 50 years ago is applicable here: "In the present status of the case before us, there is neither any 'actual controversy' upon which a judgment could operate nor 'effectual relief' which could be granted to any party." (*Paul v. Milk Depots, Inc*., *supra*, 62 Cal.2d 129, 132.)

The motion to dismiss is granted, and this appeal is ordered dismissed.

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Richman, J.

We concur:

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Kline, P.J.

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Stewart, J.